

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2503 OF 2004

BPL Communication Limited ...Petitioner

Versus

State of Maharashtra ...Respondent

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Mr.A.S.Khan for Petitioner.

Mr.R.Y.Mirza, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

FEBRUARY 8, 2005.

P.C.

1. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith, by consent. Mr.Mirza, A.P.P. waives notice for Respondent.

3. As short question is involved, the matter is taken up for final disposal forthwith, by consent.

4. Before dealing with the merits of the case, it is relevant to place on record that the accused Nos.1 and 2 have not been named as party Respondents in this Petition. The stand of the Petitioner is that at this stage, the accused are not necessary parties to the present Petition, inasmuch as the order which is impugned in this Petition is rejection of the complaint, without issuing process to the concerned accused. To buttress this position, reliance is placed on the decision reported in **A.I.R. 1922 Patna 54 in the case of Sheo Narain Singh & Ors. vs. Rampertab Rai**. It is on that basis that the matter is proceeded before this Court.

5. The order which is put in issue in the present Petition is passed by the Additional Chief Metropolitan Magistrate's Court, Mumbai, dated October 31, 2003, in C.C.No.462/Misc.2003, dismissing the complaint filed by the Petitioner against the accused, for offence under Section 138 of the Negotiable Instruments Act, in exercise of powers under Section 203 of the Criminal Procedure

Code. The reason that can be discerned for rejecting the complaint which weighed with the Magistrate is that the cheque was issued by accused No.2 and she was not legally liable to issue the same on behalf of accused No.1. It then went on to observe that it cannot be said that there is vicarious liability and co-extensive liability of accused No.2. On that reasoning, the complaint has been dismissed not only against accused No.2, but also against accused No.1. In the complaint as filed, clear assertion is made by the Petitioner that in part discharge of legal debt and liability towards the service availed by accused No.1, accused No.2 on behalf of accused No.1, had issued cheque in favour of the Petitioner Company in the sum of Rs.18,000/- (Rupees Eighteen Thousand), which cheque was presented, but was dishonoured. Statutory demand notice was sent to the accused, but they failed and neglected to make the payment within the prescribed time.

6. In view of this assertion in the complaint, although it is true that the cheque is not issued by accused No.1 and there can be no

vicarious liability of accused No.2, but the fact remains that the cheque has in fact been issued by accused No.2. Whether the cheque issued was in respect of the amount which was legally enforceable claim, is a matter of defence available to the said accused. The entire complaint could not have been thrown out by the Magistrate on the reasoning as noted in the impugned order. On the other hand, there is legal presumption that the cheque issued is in respect of legally enforceable liability and that presumption will have to be rebutted by the accused by adducing positive evidence. The complaint, therefore, could not have been dismissed by the Magistrate in exercise of powers under Section 203 of the Code. Accordingly, the impugned order deserves to be set-aside and instead, the Magistrate will have to take steps on the complaint as filed by the Petitioner in accordance with law.

7. Petition succeeds on the above terms.

A.M.KHANWILKAR, J.